IN THE

Supreme Court of the United States

October Term, 1973

NO. 73-726

COOPER STEVEDORING COMPANY, *Petitioner*

v.

FRITZ KOPKE, ET AL., *Respondents*

On Petition for a Writ of Certiorari to The United States Court of Appeals for the Fifth Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

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RESPONDENTS' BRIEF IN OPPOSITION

To The Honorable The Chief Justice and The Associates Justices of The Supreme Court of The United States:

Respondents here oppose the Petition for a Writ of Certiorari to The United States Court of Appeals for The Fifth Circuit.

STATUTES INVOLVED

Section 5 of the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1426, 33 U.S.C. §905 (1970), which provides as follows:

> "Exclusiveness of liability
>
> "The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an insured employee, or his legal representative in case death results from the injury, may elect to claim compensation under this chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, nor that the employee assumed the risk of his employment, nor that the injury was due to the contributory negligence of the employee."

QUESTION PRESENTED

In a maritime personal injury case, is there a right of contribution among joint tortfeasors who share a common liability to the injured party?

STATEMENT OF THE CASE

This case originated as an action in admiralty for damages by Troy Sessions, a longshoreman, who sustained personal injuries while in the course of his employment

by a Houston stevedoring contractor. While working in a hold of the vessel SS KARINA at Houston, Sessions was injured when he stepped into a concealed hole in a stow of palletized cargo which had been previously loaded aboard the vessel at Mobile, Alabama, by employees of Petitioner, Cooper Stevedoring Company ("Cooper"). Sessions sued Respondents, Fritz Kopke, Inc. and Alcoa Steamship Company, as owner and charterer of the KARINA (hereinafter collectively referred to as "the Vessel").

The Vessel impleaded both the Houston stevedore and Cooper, seeking indemnity in respect of Session's claim. Prior to trial, the Vessel entered into a compromise and settlement of its claim against the Houston stevedore, which was then dismissed from the suit.

Upon trial of the cause, the District Court found that the KARINA was unseaworthy by reason of the stowage of the cargo, that the Vessel and Cooper were both negligent with respect to the stowage, and that Cooper had breached its implied warranty of workmanlike service owing to the Vessel. (Contrary to the assertion contained in Petitioner's "Statement of the Case," the District Court did *not* find that the Vessel "was guilty of conduct sufficient to preclude indemnity.") On the basis of these findings, the Vessel was awarded contribution for fifty percent of the damages paid to Sessions. (Transcript of District Court's oral findings of fact and conclusions of law, Exhibit B of Petition.)

Cooper appealed the award of contribution, and the Vessel cross-appealed seeking full indemnity. The Court of Appeals affirmed, construing the District Court's findings as justifying a holding that the Vessel's conduct precluded its recovery of full indemnity for breach of

Cooper's warranty, and that contribution between the Vessel and Cooper as joint tortfeasors was proper. (Exhibit A of Petition)

ARGUMENT

THE HOLDING OF THE COURT OF APPEALS IS NOT IN CONFLICT WITH PRIOR DECISIONS OF THIS COURT.

Cooper seeks to establish a "conflict" between the result reached by the Court of Appeals in this case and the prior decisions of this Court in *Halcyon Lines, et al v. Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282 (1952), and *Atlantic Coast Line R. Co. v. Erie Lackawana R. Co.*, 406 U.S. 340 (1972). There is no conflict presented by the holdings of these cases, which are readily distinguishable upon the facts.

Halcyon was a suit by a ship repair employee against a shipowner for injuries sustained while working aboard the defendant's vessel. The shipowner sought to implead the plaintiff's employer, a repair contractor, seeking contribution from the employer as a joint tortfeasor. As a worker covered by the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§901 et seq., the plaintiff was himself precluded from suing his employer. This Court held that contribution would not lie in view of the employer's statutory grant of limited liability for injuries of its employees.

However, in a case where neither tortfeasor is statutorily immune from liability to the injured party, neither the rule nor the reason of *Halcyon's* prohibition against contribution is applicable. Accordingly, the Fifth Circuit, in *Horton & Horton, Inc. v. T/S J. E. DYER*, 428 F.2d

1131 (5th Cir. 1970), cert. den. 400 U.S. 993 (1971); and *Watz v. Zapata Offshore Company*, 431 F.2d 100 (5th Cir. 1970), and the Second Circuit, in *In re Seaboard Shipping*, 449 F.2d 132 (2nd Cir. 1971), cert. den. 406 U.S. 949 (1972), have held that the prohibition of *Halcyon* against contribution between joint tortfeasors in admiralty does not apply to a situation where none of the tortfeasors possesses a statutory immunity from tort liability and the injured party could have proceeded against any of the tortfeasors and could have recovered damages from each. In the present case, Cooper, not being Session's employer and hence not shielded by the Longshoremen's and Harborworkers' Act, was potentially liable and vulnerable to suit by Sessions no less than was the Vessel. Given the common liability of the tortfeasors to the injured party, *Halcyon* is inapplicable.[1]

The *Atlantic* case was a *per curiam* affirmance by this Court of the Second Circuit's decision in *Benazet v. Atlantic Coast Line R. Co. v. Erie Lackawana R. Co.*, 442 F.2d 694 (2d Cir. 1971). The case arose out of a suit by a yard brakeman, employed by Erie, for injuries sustained by him while working on a box car owned by another railroad, Atlantic, while the box car was being transported on a carfloat barge owned by the plaintiff's

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1. This interpretation of *Halcyon* has been espoused by the author of the opinion. Twelve years after he wrote for the Court in that case, Mr. Justice Black characterized the decision as follows:

> "In *Halcyon* * * * we held that the system of compensation which Congress established in the Longshoremen's and Harbor Workers' Compensation Act as the sole liability of a stevedoring company to its employees prevented a shipowner from shifting all or part of his liability to the injured longshoreman onto the stevedoring company, the longshoreman's employer." *Italia Societa per Azioni di Navigazione v. Oregon Stevedoring Co.*, 376 U.S. 315, 325 (1964) (Black, J., dissenting).

employer. The accident was allegedly due to a defective footboard and handbrake of the box car, and the plaintiff sued Atlantic for its negligence in supplying the defective equipment. Atlantic sought contribution from Erie on the ground that the plaintiff's employer was also actively negligent in causing the injury. Both the District Court and the Second Circuit denied Atlantic's claim on the ground that contribution under the facts of the case was precluded by *Halcyon*. This Court affirmed with a one-sentence comment that the third party complaint for contribution "in this noncollision admiralty case" was properly dismissed on the authority of *Halcyon*.

Cooper argues that this pronouncement is authority for extending the rule of *Halcyon* beyond the facts of that case to encompass the situation where the joint tortfeasor against whom contribution is sought does not enjoy statutory immunity from tort liability. Firstly, Cooper points to the Court's description of the *Atlantic* case as a "noncollision admiralty case" and contends that this "can only mean that for purposes of determining whether or not there is a right of contribution in admiralty, there are two kinds of cases: collision cases and non-collision cases." Secondly, Cooper asserts that *Atlantic* must be read as overruling the prior decisions of the lower courts because "the party against whom contribution was sought [in that case] was not statutorily immune from direct action by the plaintiff."

It is sufficient answer to the first contention to note that it is an obvious nonsequitur and a proposition unsupported by authority. The second proposition is likewise erroneous: there was no common liability of the two tortfeasors to the plaintiff in *Atlantic*. As the District Court pointed out in its opinion, reported at 315 F. Supp.

357, the limited liability provisions of the Longshoremen's and Harbor Workers' Compensation Act were applicable and shielded the plaintiff's employer from direct suit in view of this Court's holding in *Pennsylvania R. Co. v. O'Rourke*, 344 U.S. 334 (1952). 315 F. Supp. 364, f.n. 4. In *O'Rourke* it was specifically held that a railroad brakeman who was injured while working on a freight car situated on a carfloat moored on navigable waters was subject exclusively to the Longshoremen's and Harbor Worker's Compensation Act.

However, Cooper persists by arguing that the plaintiff in *Atlantic* could have sued his employer, Erie, for the unseaworthiness of its "vessel" (the carfloat) under the rule of *Reed v. The Yaka*, 373 U.S. 410 (1963), where this Court held that a longshoreman was not deprived by the Longshoremen's and Harbor Worker's Act of his remedy based upon *unseaworthiness* of a vessel that happens to be owned by his employer.

In the first place, it is not at all clear that the plaintiff in *Atlantic* had any such remedy. As is evident from the opinions of the lower courts, that case was tried practically to a conclusion without any recognition by the parties of the applicability of maritime principles. Many facts relevant to the rights of the parties—such as whether the plaintiff was a "seaman" in the contemplation of *Seas Shipping Co. v. Sieracki*, 328 U.S. 84 (1946), whether the carfloat was a "vessel in navigation," whether the defective condition of the box car could and did render the carfloat unseaworthy, the existence and breach of any *Ryan*-type warranties (c.f., *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*, 350 U.S. 124 (1956)) or contractual liabilities between the two railroads—were not adequately developed or resolved at trial.

However, even assuming that the plaintiff in *Atlantic* might have sued his employer for the unseaworthiness of the carfloat, notwithstanding the employer's potential liability arising out of his obligations as a shipowner, he cannot, given the applicability of the Longshoremen's and Harborworkers' Compensation Act, be liable to his employee for negligence, either directly or—in view of *Halcyon*—indirectly. This Court has consistently characterized a shipowner's liability for unseaworthiness as a "traditional, absolute, and non-delegable obligation which it should not be permitted to avoid." *Reed v. The Yaka, supra,* 373 U.S. at 415. It is peculiar to and inherent in his obligations as a shipowner:

> "* * * Among these is the obligation of seaworthiness. It is peculiarly and exclusively the obligation of the owner * * *" *Seas Shipping Co., Inc. v. Sieracki,* 328 U.S. 85, 100 (1946).

It does not in any sense constitute a basis of common liability for concurrent fault with a third party—which is the *sine qua non* of the right of contribution.

Since it is apparent that this Court's holding in *Halcyon,* as applied in *Atlantic,* is not in conflict with the result reached in this case, there is no justification upon that ground for issuance of a writ of certiorari.

THERE IS NO CONFLICT OF DECISIONS OF THE COURTS OF APPEALS WHICH HAVE CONSIDERED THE ISSUE PRESENTED BY THE PRESENT CASE.

Besides the Court of Appeals for the Fifth Circuit, the only other Court of Appeals to consider the question of

whether a right of contribution exists among joint tort-feasors sharing a common liability to the injured party in a maritime personal injury case, is that of the Second Circuit. That Court followed the Fifth Circuit's holding in the *Horton* and *Watz* cases in *In re Seaboard Shipping*, 440 F.2d 132 (2d Cir. 1971), cert. den. 406 U.S. 949 (1972). There is no present conflict among the Circuits on this issue, and accordingly there is no warrant upon that ground for this Court's review.

CONCLUSION

For the foregoing reasons, Respondents respectfully submit that the Petition for a Writ of Certiorari should be in all things denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Brief in Opposition to the Petition for Writ of Certiorari was served upon Messrs. B. D. McKinney and Joseph D. Cheavens, 3000 One Shell Plaza, Houston, Texas 77002, attorneys for Petitioner, by mailing copies of same to them by certified mail, return receipt requested, this _____ day of November, 1973.

_____